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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. ~~960~~ 112

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Photograph taken while standing in the Eastbound Lane of U.S. Highway 224 about 150-175 feet West of the railroad intersection looking East.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RAYMOND E. FISHER, your petitioner, who was plaintiff in the United States District Court, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered March 14, 1960.

OPINION BELOW.

The opinion of the Court of Appeals is printed in full as Supplement A (p. i, below) and has not yet been reported (*Fisher* v. *Chesapeake & Ohio Ry. Co.*, ... F. 2d ....).

No opinion was filed by Chief Judge William J. Campbell, Northern District of Illinois, whose judgment was reversed by the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals was entered March 14, 1960 (Supplement B, p. viii, below) and it became final on April 13, 1960 by denial of the plaintiff's petition for a rehearing (Supplement C, p. ix, below). The jurisdiction of this Court is invoked under the provisions of U. S. C. sec. 1254(1).

QUESTIONS PRESENTED.

Two successive juries, properly instructed that the plaintiff truck driver could not recover for serious personal injuries suffered at defendant's railroad crossing unless he proved that he was in the exercise of due care, found substantial verdicts in favor of the plaintiff. The second verdict (for $70,000) was approved by a conscientious and careful trial judge (Chief Judge William J. Campbell) against the defendant's contention that the plaintiff was guilty of contributory negligence. The Court of Appeals for the Seventh Circuit reversed the trial court's judgment on the sole ground that as a matter of Ohio law—the accident having occurred there—the plaintiff was guilty of contributory negligence.

The questions which arise are:

1. Whether the plaintiff's right to a jury trial under the Seventh Amendment to the Constitution of the United States has been taken from him by the action of the Court of Appeals in weighing conflicting evidence and conflicting inferences from contradicted evidence and in reversing the jury's factual determination that the plaintiff was in the exercise of due care at the time of the serious injuries which he sustained, including the loss of his left leg. We contend that plaintiff's constitutional rights were thus invaded.

2. Whether the Court of Appeals for the Seventh Circuit, which Circuit does not include Ohio, properly interpreted the law of Ohio, when the Court reversed without a new trial the jury's verdict that the plaintiff was in the exercise of due care in approaching an unfamiliar crossing which reasonably appeared to him to be a single railroad track. He sustained serious injury from a northbound train which came at the rate of 45 miles an hour from behind a southbound train which obscured the plaintiff's vision until 10 seconds before a collision between defendant's northbound train and plaintiff's truck, without any warning to permit the plaintiff to avoid the collision. We contend that the Ohio cases relied upon by the Court of Appeals are inapplicable here because the plaintiff was unfamiliar with the crossing involved, and the defendant failed to warn the plaintiff that what reasonably appeared to be a single track railroad intersecting a heavily traveled U. S. Highway (No. 224) was in reality a high speed double track.

3. Whether the decision of the Court of Appeals in this case, which ignored the interplay of the defendant's negligence *as a matter of fact* in determining the question whether the plaintiff was guilty of contributory negligence *as a matter of law*, is in conflict with cases in the Sixth Federal Circuit which interpret Ohio law dealing with plaintiff's contributory negligence as not requiring a plaintiff to anticipate negligence on the part of a defendant. We contend that the decision in the instant case conflicts with the Sixth Circuit case of *Northwest Airlines* v. *Glenn L. Martin Co.*, 224 F. 2d 120 (C. A. 6, 1955) holding (p. 127) that under Ohio law it "is not contributory negligence to fail to look out for danger when there is no reason to apprehend any" and that a plaintiff "is not required to anticipate negligent acts or omissions on the part of others," and with *New York Central Railroad Company* v.

Delich, 252 F. 2d 522 (C. A. 6, 1958), holding on facts which were very similar to the relevant facts in our case that (p. 526) "where, because of the inherent hazards of the several tracks, the great speed of the train, the physical condition of the crossing, the lack of due warning and other circumstances set out here, reasonable minds might differ as to whether the decedent was showing due care, both Ohio courts and this court, construing Ohio law, have upheld verdicts for plaintiff."

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provision involved herein is the Seventh Amendment to the Constitution of the United States which is:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutory provisions involved herein are Ohio Revised Statutes and Tracks and Crossings—Section 4955.32 (8853):

> "Every company shall attach to each locomotive engine passing upon its road a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine in motion and approaching a turnpike, highway, or street crossing or a private crossing, where the view of such crossing is obstructed by an embankment, trees, curve, or other obstruction to view, upon the same line with the crossing, and in like manner where the railroad crosses any other traveled place by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at least 80 and not further than 100 rods from such crossing and ring such bell continuously until the engine passes the crossing." (App. 124.)

Section 4907.47:

"If, in the opinion of the public utilities commission, the public safety requires that a gate, automatic alarm bell, or other mechanical device should be erected and maintained at any place where a public road or street is crossed at the same level by a railroad, and the crossing has been declared by the commission to be dangerous, or the public safety requires that a flagman be stationed and maintained at such crossing, the commission shall give the superintendent, manager, or other officer in charge of such railroad, a written notice of what is required. The company, person, or corporation owning or operating such railroad shall erect such mechanical device or station such flagman within the time prescribed by the commission. * * *." (App. 125.)

STATEMENT.

Petitioner, the plaintiff, a resident of Illinois, sued the respondent, the defendant, a corporation of Virginia, in the United States District Court for the Northern District of Illinois under the district court's diversity jurisdiction, for serious injuries to his person and property damage to his truck growing out of a collision between plaintiff's eastbound truck and a northbound train of defendant at defendant's crossing of U. S. Highway 224 in Seneca County, Ohio (App. 3-7).

[The case was presented in the Court of Appeals on a separately printed Appendix for Defendant-Appellant, herein called "App." and an Additional Appendix attached to Plaintiff-Appellee's brief, herein called "Addl. App." Certified copies and nine uncertified copies of the above two appendices have been filed in this Court. Also the original transcript and exhibits certified by the Clerk of the Court of Appeals have been filed herein.]

The complaint filed in the District Court alleged that the plaintiff was in the exercise of due care for his own safety (App. 4), that the injury was caused solely by the negligence of the defendant (App. 4), and also *inter alia* that the defendant negligently failed to install warning bells, automatic flashing red lights, automatic gates, or other signals or devices, or a watchman or guard, that the crossing was extrahazardous because it intersected a heavily traveled public highway, because there was a definite change of grade so that a full view of the crossing revealing more than one track was completely obscured and because there were no warning signs at the crossing or at any distance prior to the crossing that there was more than one track (App. 5-6).

The complaint alleged various other acts of negligence on the part of the defendant: failing to sound a bell or whistle within 80 to 100 rods from said crossing as required by Section 4955.32 of the Ohio Revised Statutes, operating its train at excessive speed having regard for the intersecting heavily traveled public highway and all of the surrounding circumstances, and other negligent acts which it is unnecessary to mention here because the Court of Appeals reversed the jury verdict solely on the ground that in the opinion of that Court the plaintiff was, under Ohio law, guilty of contributory negligence as a matter of law.

The defendant filed an answer (App. 8-12) denying generally the plaintiff's allegation of due care and of defendant's negligence, and pleading that the crossing was in open country and the full vision of said crossing was apparent to any driver of a truck who was in the exercise of due care for his own safety (App. 11).

The defendant's answer did not deny that there was no sign or other warning that there was more than one track but alleged that "said crossing was an open one in the country where there was full visibility, where signs indicated the existence of said railroad crossing and where a view of the approach of the northbound train of defendant was afforded" (App. 11).

The first trial before Judge Walter J. LaBuy resulted in a verdict for plaintiff of $88,000. Judge LaBuy denied defendant's motion for judgment notwithstanding the verdict but granted defendant a new trial (App. 1).

The new trial before Chief Judge William J. Campbell resulted in a verdict for plaintiff for $70,000 (App. 232) upon which Judge Campbell entered judgment (App. 232). Defendant filed a motion for a directed verdict on which action had been reserved, and for judgment notwithstand-

ing the verdict on the ground, *inter alia*, that the evidence showed conclusively that plaintiff's injuries resulted from his own negligence and there was no evidence that plaintiff was free from negligence (App. 233). This motion and an elaborate motion for a new trial (App. 233-235) were denied by Judge Campbell (App. 240).

Judge Campbell's charge to the jury (App. 117-135) was a very fair one and placed on the plaintiff the burden of proving his own due care as well as the negligence of the defendant. We urge this Court to examine the charge to the jury.

On appeal, the Court of Appeals reversed, as has been stated, solely on the ground that, under Ohio crossing cases which it cited, the plaintiff was guilty of contributory negligence as a matter of law.

The evidence on the trial was conflicting but the evidence taken most favorably to the plaintiff, as must be done after a favorable jury verdict, indicated the following:

Plaintiff, an experienced truck driver, aged 27, who had never had a prior accident (Addl. App. 1) was driving a 9,000 pound tractor and 13,000 pound trailer loaded with 36,000 pounds of butter eastbound on U. S. 224, a main east and west federal arterial highway, about noon on February 7, 1954, just west of the defendant's two-track crossing over which plaintiff had never traveled before (App. 19).

Plaintiff's Exhibit 1 (App. 139) reproduced on the inside front cover of this Petition is a view of the crossing as seen by the plaintiff as he approached it. This looks like a single track crossing. Because of a dip or declevity in the highway west of the crossing, the second (northbound) track is obscured so that the crossing looks like one track—"the way you see there was one track" (App. 20). The second track cannot be seen from the bottom of the declev-

ity (App. 20-32, 41-42, 139). It was stipulated on the trial that there was no sign indicating more than one track (Addl. App. 2). There was a simple cross-buck sign observable in Plaintiff's Exhibit 2 which read "Railroad Crossing Lookout for Locomotive" (App. 21, 142). Defendant stipulated that there were no stop signs, flasher lights, automatic gates, bells or other safety devices or any crossing guard signalling the approach of the northbound train or guarding the crossing as the train approached (App. 21, 24, 28, 114, Addl. App. 1-2).

U. S. Highway 224, about 150 feet west of the railroad crossing, dipped 4 to 8 feet below the grade of the crossing (App. 20, 28, 31, 53-54, 57, 59, 63, 64). The downgrade into this dip coming from the west obscured a driver's view of the crossing (App. 32, 55).

The defendant's double tracks cross Highway 224 in a generally north and south direction (App. 71) but south of the highway there is an "S" curve westward (App. 27, 71) so that a southbound train completely obscures a northbound train (App. 27).

This rail crossing was extrahazardous because of

—heavy traffic on U. S. 224 (App. 53; Plaintiff's Exhibits 94-95, App. 152-157);

—a double-track high speed roadbed (App. 70; Plaintiff's Exhibits 3, 4, 5, App. 141-143);

—heavy railroad traffic (App. 70, Plaintiff's Exhibit 98, App. 158-168). with a 70 miles an hour limit for passenger trains and 60 miles an hour limit for freight trains (App. 45);

—an 8 foot dip 150 feet west of the railroad crossing, causing a 7 per cent rise commencing 150 feet west of the track (App. 20, 28, 31, 32, 53-54, 55, 57, 59, 63, 64);

—the S-curve located south of the crossing so that southbound trains blocked a view of northbound trains (App. 27, 109);

—the northbound track was on a downgrade at its intersection with U. S. Highway 224 (App. 107, 111-112).

When driving eastward about three-quarters of a mile west of the crossing on the day of the collision plaintiff saw a train at the crossing going in a southerly direction (App. 20, 35). There was no mark showing 2 tracks (App. 20, Addl. App. 2) and "the way it was marked and everything the way you see there was one track" (App. 20).

Plaintiff took his foot off the gas pedal and started slowing down and continued to decelerate (App. 20). At a point 200 feet from the crossing the southbound train cleared the crossing and when plaintiff was coming up out of the dip in the highway 150 feet from the railroad crossing he looked north from where the southbound train had come and was listening for a train. He then looked south and saw the northbound train coming from behind the southbound train 600 feet away at a rate of 45 miles per hour (App. 27, 100, 211). The front end of the northbound train passed the caboose of the southbound train about 150 to 200 yards [450 to 600 feet] south of Highway 224 (App. 24).

Only when the engine of the northbound train cleared the caboose did it whistle—approximately 600 feet from the highway (App. 21, 24).

At 45 miles per hour the northbound train traveled 66 feet per second and so traveled the distance of 600 feet in less than 10 seconds.

In this period plaintiff applied all the brakes he had, swerved his truck to the left to go into the ditch, but found it too deep, so he turned the truck south, to his right, in an

effort to go south on the southbound track and he almost stopped, going 2 or 3 miles an hour (App. 20). The defendant's diesel caught the left front corner of the truck (App. 20, 39) and seriously injured the plaintiff so that his left leg had to be amputated (App. 23).

The defendant's engine crew was completely familiar with the crossing at U. S. Highway 224 ("crossed there about every day for some 30 years;" App. 69; "have gone over it thousands of times" App. 109), were in significant disagreement as to the distance south of the highway at which the engine of the northbound train emerged from behind the caboose of the southbound train (App. 67, 107), and admittedly did not slow down even though they knew that the southbound train obscured a view of their train by eastbound highway traffic (App. 110).

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals has re-examined the evidence other "than according to the rules of the common law" and thereby invaded the plaintiff's right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

II. The Court of Appeals has decided an important question of Ohio law in a manner inconsistent with Ohio cases which hold that when the question of contributory negligence depends on a variety of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question should be submitted to the jury. The Ohio cases cited by the Court of Appeals to take the instant case out of the general rule are inapposite here because in those cases the plaintiffs were familiar with the railroad crossings involved, whereas here the plaintiff was not. Here there was no warning that there were two tracks, either by a sign

or by the safety devices which the jury could have found to be customary at double-track crossings over heavily-traveled arterial highways. There is no presumption of law that tracks are double-tracks and it was for the jury to say whether under all the circumstances the plaintiff was justified in acting on his belief that the crossing here was a single-track.

III. In reaching its conclusion that the plaintiff was guilty of contributory negligence as *a matter of law* the Court of Appeals rendered a decision which ignored the interplay of the defendant's negligence *as a matter of fact,* and which conflicts with Ohio law as announced and followed in the Sixth Circuit case of *Northwest Airlines* v. *Glenn L. Martin Co.,* 224 F. 2d 120 (C. A. 6, 1955), holding (p. 127) that under Ohio law it "is not contributory negligence to fail to look out for danger when there is no reason to apprehend any" and that a plaintiff "is not required to anticipate negligent acts or omissions on the part of others," and which conflicts with *New York Central Railroad Company* v. *Delich,* 252 F. 2d 522 (C. A. 6, 1958), that (p. 526) "where, because of the inherent hazards of the several tracks, the great speed of the train, the physical condition of the crossing, the lack of due warning and other circumstances set out here, reasonable minds might differ as to whether the decedent was showing due care, both Ohio courts and this court, construing Ohio law, have upheld verdicts for plaintiff."

ARGUMENT.

I.

The Judgment of the Court of Appeals Invaded the Plaintiff's Right to a Jury Trial under the Seventh Amendment to the Constitution of the United States.

We submit that the Court of Appeals invaded the constitutional right of the plaintiff to a jury trial in its decision in the instant case.

The provision of the Seventh Amendment, "no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law" is "a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner." *Parsons* v. *Bedford,* 3 Pet. 433 (1830).

We respectfully submit that in determining that the plaintiff was guilty of contributory negligence in this case the Court of Appeals invaded the province of the jury.

This Court said in *Washington and Georgetown Railroad Co.* v. *McDade,* 135 U. S. 554 (1889):

> "As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences."

This case has been cited and approved as recently as January 25, 1960—*Davis* v. *Virginian Railway Co.,* 361 U. S. 354, 357.

As this Court has repeatedly said: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different infer-

ences or conclusions or because judges feel that other results are more ~~favorable~~."—*Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35 (1944); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (Nov. 30, 1959), reversing 256 F. 2d 156 (C. A. 5, 1958).

The petitioner by his petition for rehearing in the Court of Appeals contended that setting aside the verdict in the present case deprived the plaintiff of that jury trial according to the common law which the Federal Constitution guaranteed him.

In answer, defendant contended that cases arising under the Federal Employers Liability Act, such as *Tennant*, *supra*, were not in point because they involved rights granted by a Federal statute. The Courts of Appeal for the Fourth and Sixth Circuit have made no such distinction and we submit that no such distinction exists.

In *Pennsylvania R. R.* v. *Goldie*, 182 F. 2d 9 (C. A. 6, 1950), the Court said (p. 12):

> "It is true that the cases cited are all cases involving the Federal Employers Liability Act, 45 U. S. C. A. § 51 et seq. We see, however, no difference in principle in differentiating the function of the court from that of the jury between cases under that act and cases otherwise arising in the federal courts involving actions for damages due to negligence."

The right to a jury trial under the Federal Constitution is not limited to F. E. L. A. cases and on a motion for a directed verdict (or judgment notwithstanding the verdict) the court "must accept as true all the facts favorable to the plaintiff which the defendant tends to prove and draw all reasonable inferences against the defendant."

> *Grooms* v. *Minute-Maid*, 267 F. 2d 541, 546 (C. A. 4, 1959).
>
> *Town of Ninety-Six* v. *Southern Railway Co.*, 267 F. 2d 579, 582 (C. A. 4, 1959).

Neither of the two cases just cited is an F. E. L. A. case.

The evidence on the trial of the instant case on the issue of the plaintiff's due care raised the questions

—whether the dip in U. S. Highway 224 west of the defendant's two-track railway right-of-way was sufficient to interfere with the plaintiff's vision of the second (northbound) track;

—whether the undoubted failure of the defendant to give warning that the crossing comprised two tracks did under all of the circumstances of the instant case relieve the plaintiff of the duty of stopping, looking and listening for a possible northbound train on a hidden track of which he had no warning;

—whether the combination of the dip in the highway, the physical appearance of the railroad crossing as plaintiff approached it from the west [see Plaintiff's Exhibit 1 on the inside front cover of this Petition], the failure of the defendant to warn of the existence of the second track, and the failure of the train to give the statutory whistle signal 80 to 100 rods south of U. S. Highway 224, taken together, would support a finding by the jury that the plaintiff was in the exercise of due care.

In spite of a jury verdict in favor of the plaintiff on all of the above issues the Court of Appeals, on a judge-made determination that the plaintiff was guilty of contributory negligence as a matter of law, took from the plaintiff his judgment for $70,000.

The Court of Appeals held, contrary to the jury's verdict, that the "plaintiff approached the railroad crossing in level country" (p. vi, below).

This statement is contrary to the testimony of plaintiff (App. 20, 21, 42), the testimony of a local farmer who resided in the area for 47 years (App. 27, 28), of the farmer's 22 year old son who lived all of his life in the vicinity (App. 31, 32), and the testimony of an Ohio state

highway patrolman who investigated the accident (App. 53-54, 57), none of which evidence was contradicted.*

The opinion of the Court of Appeals also states (below, p. vi) that there "was no obstruction to his view of the tracks in any feature of the crossing itself." Granting that the declevity in Highway 224 west of the crossing was

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*The Plaintiff, Raymond Earl Fisher, testified (App. 42):

"He [the southbound train] was still there in the corner of my vision as I went down into that dip. When I was 350 feet from the crossing, I was going down enough so that the dip obstructed the tracks, and everything appeared with the top of the cab coming down. * * * At that time there was a dip at the place that obstructs your view."

Fred Roosevelt Scaife, a local farmer who resided in the area for 47 years (App. 28):

"There is a dip west of the intersection, roughly between 150 to 200 feet, and the dip extends down about 8 feet. The roadbed of the railroad tracks is about 8 feet above the lowest part of the dip."

Robert Lee Scaife, aged 22, who lived in the area all of his life (App. 31):

"There is a dip west of the railroad. The dip begins approximately 200 feet west of the railroad track and at the bottom of the dip the railroad bed is approximately 8 feet above it."

H. R. LaWarre, State Highway Patrolman:

"There is an upgrade from the approach to the railroad up to the grade crossing. * * * At the time of the accident, there was a dip west of the intersection. * * * I would say it would be approximately 100 to 250 feet west of the railroad proper, the bottom of this downgrade. Then it goes on a definite upgrade to the grade crossing. The distance from the bottom of the dip to the top of the rails of the railroad track would be an estimate, I would say, in excess of 4 feet." (App. 53-54.)

"The low part of the dip as you approach the crossing from the west is about 150 to 200 feet from the crossing." (App. 57.)

not a "feature of the crossing itself", nevertheless, the dip 150 feet west of the crossing was an obstruction to the view of the east track, the second set of tracks. The plaintiff, being a stranger to the crossing and not being familiar with it and not having been apprised of the existence of the second set of tracks by any warning sign, and being unable to see the second track because of the dip, could not know that his view of a second set of tracks was being obstructed by the southbound train.

That the dip in the highway west of the crossing impeded the plaintiff's view of the second set of tracks is fully substantiated by the record:

(a) Admissions against interest in defendant-appellant's reply brief in the Court of Appeals (p. 2):

> "Since the tracks lie in a horizontal plane, only the near tracks would be presented to the eye."

(b) Plaintiff's Exhibit 1 (inside front cover of this Petition) shows that the second set of tracks was not visible to a traveler approaching from the west, even while driving upgrade from the dip. Both tracks were completely obscured on the downgrade.

(c) The obstruction to the plaintiff's view of the tracks caused by the dip in the road is fully established by the testimony of the following witnesses:

The plaintiff, Raymond E. Fisher:

> "At this point there was this dip where I started to go down. He [the southbound train] went out of my vision. (App. 20.)
>
> "He [the southbound train] was still there in the corner of my vision when I went into that dip. When I was 350 feet from the crossing, I was going down enough so that the dip obstructed the tracks and everything disappeared with the top of the cab coming down. I couldn't see how far the southbound train had gone past the crossing. At that time there was a dip at the place that obstructs your view." (App. 42.)

Robert Lee Scaife:

> "I would say there is something about that dip which interferes with vision as you drive east. Right there you can't tell if it is a double track or a single track. From where the truck was, you can't tell if it is a double track or a single track." (App. 32.)

H. R. LaWarre:

> "The dip also obstructed your view. As the vehicle approaches the railroad track going down the downgrade, your view if you want to see something up here, just like looking out an airplane without looking out the windows or something, I mean, you just don't have the view ahead of you unless you get out of your driving position. I have done it many times and I know, especially at that crossing. You are looking out on a parallel line with the bottom of the vehicle and regardless of where the bottom of the vehicle goes, the parallel line of your sight does not change. Therefore, when you are going downgrade, you are looking downgrade, and if you have to look up a hill or grade crossing, you would either have to get down like this and look up or whatever it might be. It would definitely obstruct your view of the crossing." (App. 55.)

The statement by the Court of Appeals that the plaintiff "started accelerating to go across on the assumption that no other train was coming" (p. vi, below) is inaccurate. First, plaintiff did not accelerate. Second, he did not know of the second track so, emphatically *he did not "assume"* either that a train was; or was not, coming on that unknown and hidden track. Plaintiff testified that he continued to decelerate (App. 20), the farmer driving behind him testified that the witness caught up with the plaintiff because plaintiff decelerated (App. 27), and even the fireman on the defendant's northbound train testified that the truck appeared to be slowing down (App. 68). The police report (App. 94) states that the plaintiff "dropped into fourth gear", not that he accelerated. There is no testimony whatever that plaintiff accelerated.

That the jury could reasonably find that the crossing looked to plaintiff, coming from the west, to be a single track, not a double track, is shown

—by Plaintiff's Exhibit 1, inside front cover of this Petition (App. 139).

—by Plaintiff's testimony (Addl. App. 1, Original Transcript, p. 14):

> "I was listening for a train, and I had seen him as I come up again off over here, just a glimpse of him, and about that time I seen another one come out of somewhere, and this confused me because to me this was just the way it was marked and everything the way you see there was one track."

—and by the local farmer's testimony on cross-examination (App. 32, Addl. App. 2, Original Transcript, pp. 37-OO and 37-PP):

> "Q. (by defendant's attorney) You mean at this point here (indicating), you can't tell whether that is a single track or a double track, is that right?
> "A. I couldn't tell in his position, no, I couldn't.
> "Q. Could be either one?
> "A. Could be either one.
> "Q. Either a double track or a single track?
> "A. There is no mark—"

Defendant argued in the Court of Appeals, below, that "plaintiff as an experienced truck driver over Highway 224, through Ohio, must have known that most open country crossings are double track. It is apparent that for plaintiff to assume that the crossing was a single track is itself negligence * * *" (Ans. to Petn. for Rehearing, p. 3). We submit that these arguments, although actually unsupported by evidence, were questions only for the jury, not for the Court of Appeals, and that the jury having rejected the arguments and held in plaintiff's favor, the Court of Appeals should not have disregarded the jury's verdict.

The opinion of the Court is completely silent on the plaintiff's allegation (App. 5-6) denied by defendant (App. 10-11) that the second, northbound track was obscured by the change in grade. The only thing said by the Court about this question is (p. iii, below):

> "There also was a depression in the highway which reached its low point some 200 feet west of the crossing which, *according to plaintiff's testimony*, obstructed plaintiff's view to the south as he traveled down-grade to the low point thereof." (Italics ours.)

This clearly implies, contrary to the strong corroborating evidence just elaborated, that only the plaintiff's unsupported word mentioned the obstruction of vision caused by the dip in the pavement. The court below does not state whether in fact there was an obstruction to the plaintiff's view of the northbound track and whether he was justified in believing that there was only a single track because of the obstruction of his view, the lack of a sign that there were two tracks, and the absence of all safety devices. By ignoring this issue and the testimony of disinterested witnesses supporting the plaintiff, the court below effectually overruled the jury's verdict on this most important single issue in the case *sub silentio*. If that is not a deprivation of the plaintiff's right to have a jury of twelve men and women who heard and saw the witnesses—and not three judges of a reviewing court who neither heard nor saw the witnesses—pass on the facts of his case it is impossible to imagine a situation which would constitute such deprivation.

The Court of Appeals further stated (p. vii, below):

> "Plaintiff knew that he was approaching a place of danger. Even if he had never seen the crossing before, he was advised of the danger by warning signs marking the approach thereto and by his knowledge of the passage of the south-bound train."

This statement ignores the evidence from which the jury could have reasonably concluded that the plaintiff—being entirely unfamiliar with the crossing and a stranger to it, not being warned by the defendant of the existence of the northbound track which was obscured by the terrain and by the defendant's southbound train—was not required to assume the existence of a danger which was not reasonably apparent to him. Emphatically, under the facts of the instant case, the jury could and did find that the plaintiff did not know or have reasonable ground to believe that he was in a place of danger created by an unknown second track and a hidden northbound train.

As *Marietta & Cincinnati R. R. Co.* v. *Picksley*, 24 Ohio St. 654 (1874), involving a railroad crossing accident, in discussing contributory negligence stated (p. 668):

> "The person whose conduct is to be judged can not be separated from the circumstances by which he is surrounded, and under which he is required to act."

It is quite possible that we will have no opportunity to reply to the defendant's answer that may be filed to this Petition. Based on experience with the defendant in the Courts below, we now anticipate two arguments which it will make.

Plaintiff testified by deposition (App. 35) and on the first trial of this case (App. 61) that the train which struck him was on the west track, instead of the east track as he testified on the second trial (App. 35). He was confused by the police report, made by an experienced officer (App. 53), which report showed that the west track was the one involved (App. 212). At the second trial, defendant laid bare this inconsistency (App. 35, 53) and the jury accepted the plaintiff's testimony on the second trial as true.

The defendant also made much capital of the plaintiff's

statement to the defendant's fireman at the scene of the accident, that the "flasher lights were out" (App. 69), and a half hour later in the hospital to the police officer that "I saw the blinker lights go out" (App. 94), when in fact there were no flasher lights or blinker lights at the crossing. The testimony shows clearly that the plaintiff, an experienced truck driver, reasonably expected to find some safety precautions at an extra-hazardous, two-track crossing, and that failing to see the lights flashing, he assumed mistakenly that they had gone out. This, too, was all submitted to the jury, which found in plaintiff's favor.

Neither of the above arguments has any relevance after a jury verdict in favor of the plaintiff.

We respectfully submit that in setting aside the jury's verdict the Court of Appeals ignored evidence favorable to the plaintiff, construed the evidence unfavorably to the plaintiff instead of favorably, and in setting aside the jury's verdict deprived the plaintiff of a trial of the issues of fact by jury guaranteed to him by the Seventh Amendment to the Constitution of the United States.

II.

The Court of Appeals Misinterpreted Ohio Law in Holding the Plaintiff Guilty of Contributory Negligence.

The general rule of Ohio decisional law on the question of contributory negligence in a railroad crossing case is stated by the Supreme Court of that State in *Cleveland, C., C. & I. Ry. Co.* v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321, (1888), as follows (17 N. E., at 324):

> "It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if

the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties, and used such care, must depend upon the particular circumstance. For instance, it has been held that the absence of the usual signboard of warning is a circumstance which may properly go to a jury to enable them to determine whether the person attempting to cross the railroad track has been guilty of such negligence as would defeat his recovery. The reason assigned is 'that, if the traveler is a stranger to the crossing, the want of such warning would be calculated to mislead him into danger; and, if he was familiar with the crossing, it might operate as a reminder of danger which he might otherwise forget.' And, generally, 'when the question of contributory negligence depends upon a variety of circumstances, from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions.' *Railroad* v. *Whitacre*, 35 Ohio St. 627."

This case has been repeatedly approved by Ohio courts and by the United States Court of Appeals for the Sixth Circuit in which Ohio is located:

Thomas v. *Pennsylvania R. Co.*, 70 Ohio App. 191, 45 N. E. 2d 776, 779 (1942).

Eastern Motor Dispatch, Inc. v. *Pennsylvania R. Co.*, 77 N. E. 2d 275, 277 (Ohio App., 1947).

New York Central Railroad Company v. *Delich*, 252 F. 2d 522, 524 (C. A. 6, 1958).

Particularly on account of the dip in the highway west of the crossing, the omission by the defendant of a sign giving timely warning to eastbound traffic of the existence of two tracks is not simply evidence of negligence on the part of the defendant, but it also was a circumstance to be taken into consideration by the jury in determining whether or not the plaintiff was under all of the circumstances in

the exercise of due care. This interplay between defendant's negligence and plaintiff's obligation to exercise due care is clearly demonstrated by the above quotation from the *Schneider* case, which is the leading Ohio case in this field of law.

The Court of Appeals, after citing the nine Ohio cases which we now itemize, stated (p. vi, below):

"We think that the case at bar bears no factual distinction from the cited cases."

In truth, the Ohio cases cited by the Court of Appeals contain a controlling distinction from the case at bar: the plaintiffs were familiar with the extent of the danger involved because they were familiar with the crossings there involved.

The plaintiff in the case at bar was not familiar with the crossing, the defendant did not warn him of the presence of the second track, and the jury found that the plaintiff reasonably believed the crossing to be only a single track. These facts in the case at bar differentiate our case from the nine cases cited herein by the Court of Appeals for the Seventh Circuit.

Thus, in *Woodworth* v. *New York Central R. Co.*, 149 Ohio St. 543, 80 N. E. 2d 142 (1948), at page 548, the court said:

> "There is undisputed testimony that Woodworth, the decedent, was familiar with the existence and effect of these lights [claimed to obscure a traveler's vision] and had frequently traveled over the crossing in question at night since the installation of the lights."

In *Reed* v. *Detroit, T. & I. R. Co.*, 132 N. E. 2d 776 (Ohio App., 1955), the court stated (p. 778):

> "The appellant urges * * * that the Court committed prejudicial error in admitting the testimony of the decedent's employer upon cross examination to the

effect that the decedent was familiar with the crossing. He testified that the decedent had traveled the same route at least once a week since the latter part of September, the accident occurring on December 17th of the same year. This testimony was pertinent and relative [relevant] to the issues presented and clearly admissible."

In the *Reed* case, therefore, the decision that the plaintiff was guilty of contributory negligence as a matter of law was expressly based upon evidence of plaintiff's familiarity with the railroad crossing involved therein, whereas the evidence in the case at bar is conclusive that the plaintiff herein had no familiarity with the fact that the railroad crossing which looked like a single track, was in reality a double track.

In *Pennsylvania R. Co.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826 (1927), the court said (p. 826 of 159 N. E.):

"Plaintiff was very familiar with this crossing; had been over it both ways more than 100 times * * *."

In *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597 (1939), the court said (p. 598 of 24 N. E. 2d):

"Plaintiff's decedent, who was a coal trucker hauling coal from Coshocton to a point in Bucyrus north of the railroad, had used the crossing frequently and was familiar with it."

Toledo Terminal R. Co. v. *Hughes*, 115 Ohio St. 562, 154 N. E. 916 (1926), held that the plaintiff knew of the existence of the crossing and that driving his car *into a standing train* was contributory negligence as a matter of law.

In *Detroit, T. & I. R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714 (1926), the court said (p. 715 of 151 N. E.):

"The owner of the automobile had lived for more than 3 years within about 100 feet of this crossing, where he carried on a general store, with living quarters in the same building."

In *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448 (1937), the court said (p. 449 of 10 N. E. 2d):

> "The driver was familiar with the locality and testified that in the past a brakeman or other employee of the railroad stood in the street and flagged approaching traffic when a train was about to cross Front Street."

In *Continental Baking Co.* v. *Pennsylvania R. Co.*, 96 N. E. 2d 258 (Ohio App., 1950), the court said (p. 260):

> "For a number of years the driver had driven this route six days a week."

Of the nine cases cited by the court below, only in the case of *Bowman* v. *Baltimore & Ohio Ry. Co.*, 90 N. E. 2d 390 (Ohio App., 1949), is the opinion barren of evidence that the plaintiff was familiar with the crossing involved, and in that case only one train was involved and the only question was whether the existence of a plainly observable obstruction which obscured the approaching train rebutted an inference of contributory negligence on the part of the driver in failing to observe the single train coming toward him.

Familiarity with the rail crossing which the plaintiff here lacked distinguishes the cases cited by the Court of Appeals from the case at bar, as was held in *Zivkoff* v. *Pennsylvania R. Co.*, 90 N. E. 2d 148 (Ohio App. 1948), a crossing collision case wherein the court said (at p. 151) in distinguishing *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597:

> "The facts of the case of *Patton, Admx.*, v. *Pennsylvania R. Co., supra*, are similar to those in the case at bar but with some important differences. In the Patton case, the driver was thoroughly familiar with the crossing; here there was no evidence that he was.

> In that case there were warning devices; here there were none. There is also a substantial difference in the view of the driver approaching a crossing."

The above quotation from the *Zivkoff* case is precisely applicable to the case at bar in differentiating from our facts the facts in the cases cited as controlling by the Court of Appeals.

Although the opinion of the Court of Appeals herein indicates a skepticism on the part of that Court toward the truth of the testimony of the plaintiff that he was unfamiliar with the crossing in question, the plaintiff testified, without contradiction or impeachment, that he had never been on this highway at this crossing before this accident. Although the plaintiff had previously been on U. S. Highway 224, he had not been on the highway at this point. This evidence, which was accepted by the jury, should have been binding on the Court of Appeals, but that Court's refusal to reject the nine cases which it cited, on the ground that the plaintiff here was unfamiliar with the crossing in question, is significant as indicating a refusal by the Court to accept the plaintiff's testimony. Having been accepted by the jury, this evidence, we repeat, cannot now be disregarded.

The following cases, instead of the cases cited by the Court of Appeals, announce the Ohio law applicable to the instant case, namely, that the question of plaintiff's due care was strictly a jury question, and the decision of the Court of Appeals in the instant case is, therefore, at variance and in conflict with the decisions of the Ohio Courts (and, as we shall show, the United States Court of Appeals for the Sixth Circuit) on this question:

Cleveland, C., C. & I. Ry. Co. v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321 (1888).

Thomas v. *Pennsylvania R. Co.*, 70 Ohio App. 191, 45 N. E. 2d 776, 779 (1942).

Eastern Motor Dispatch, Inc. v. *Pennsylvania R. Co.*, 77 N. E. 2d 275, 277 (Ohio App. 1947).
Biery v. *Pennsylvania R. Co.*, 156 Ohio St. 75, 99 N. E. 2d 895 (1951).

The above cases hold that where, as in the case at bar, the question whether the plaintiff's conduct was negligent depends on conflicting evidence or upon inferences to be deduced from a variety of circumstances, the question of contributory negligence is one to be determined by a jury. In compliance with Ohio law, the Court of Appeals should have followed that rule in the instant case.

III.

The Decision Respecting Ohio Law Conflicts With Decisions of the Court of Appeals for the Sixth Circuit in Which Ohio Is Located.

We have already pointed out that in determining as a matter of law that the plaintiff was guilty of contributory negligence, the Court of Appeals for the Seventh Circuit in the instant case did not give adequate consideration to the failure of the defendant to post a warning that what might appear to be a single track—and did so appear to the plaintiff—was in reality a double track, and did not give adequate consideration to the failure of the defendant to give the statutory whistle warning of the approach of the northbound train. These circumstances go not alone to the question of whether the defendant was negligent, but they are also important circumstances bearing upon the question whether the plaintiff was in the exercise of due care.

In failing to give any consideration to these two important points, the decision of the court below conflicts with the decision of the Court of Appeals for the Sixth Circuit

in *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120 (C. A. 6, 1955), opinion by Stewart, Circuit Judge. In discussing contributory negligence in that case, which was a suit by an airline against the manufacturer of an airplane alleged to be defective, the Court of Appeals for the Sixth Circuit in applying Ohio law said (citations omitted) at page 127:

> "One need not anticipate the negligence of another until he becomes aware of such negligence. * * * it is not contributory negligence to fail to look out for danger where there is no reason to apprehend any. * * * One to whom a duty is owed has a right to assume that it will be performed. He is not required to anticipate negligent acts or omissions on the part of others."

The decision in the case at bar is also in conflict with the decision of the Court of Appeals for the Sixth Circuit based upon Ohio law in *New York Central Railroad Company* v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958). In the latter case, the Court of Appeals for the Sixth Circuit held that a truck driver was not guilty of contributory negligence as a matter of law while approaching a multiple track crossing on which he was hit by a train. The defendant railroad in the *Delich* case strongly urged upon the Court of Appeals that it adopt as inflexible the doctrine of *Detroit, Toledo & Ironton R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714 (1926) and *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597 (1939). In the *Delich* case the Court of Appeals for the Sixth Circuit refused to apply blindly the cases typical of the cases applied by the Seventh Circuit herein. Instead, the Sixth Circuit held (p. 526) that where, because of hazards similar to those existing in our case, reasonable minds might differ as to whether the decedent was showing due care, contributory negligence was a question of fact for the jury, and that the trial judge properly overruled defend-

ant's motions for a directed verdict and for judgment notwithstanding the verdict.

The decision of our case by the Court of Appeals for the Seventh Circuit clearly conflicts with the decisions of the Court of Appeals for the Sixth Circuit on an important question of Ohio law.

CONCLUSION.

The judgment below, dealing as it does with the important question of liability for injuries on the highways, with the constitutional right of an Illinois truck driver who was injured in Ohio by a Virginia railroad corporation to have his case tried by a jury, and with the misinterpretation and misapplication of Ohio law by a court located outside of that state, creating a sharp conflict with the decisions of the Sixth Circuit (in which Ohio is located), necessitates the exercise of this Court's important judicial and supervisory power by the issuance of the writ of certiorari as prayed herein.

Respectfully submitted,

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May 26, 1960.

SUPPLEMENT A.

OPINION BELOW.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 12767. September Term, 1959—January Session, 1960.

RAYMOND E. FISHER,
Plaintiff-Appellee,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 14, 1960.

Before HASTINGS, *Chief Judge*, CASTLE, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. Defendant prosecutes this appeal to review a judgment entered against it upon a verdict of the jury empaneled to try this action for damages for personal injuries sustained by plaintiff in a collision between a truck driven by plaintiff and one of defendant's trains. Errors relied upon for reversal, among others, relate to the failure of the trial court to grant defendant's motions for a directed verdict and its motion to set aside the verdict, or, in the alternative, for a new trial.

The accident in question occurred on February 7, 1954. About noon, on that day, plaintiff was driving a tractor-

trailer combination east on United States Highway 224 near Findlay, Ohio. The day was clear and the road was dry. As plaintiff approached a grade crossing of Highway 224 and defendant's tracks, he saw a south-bound freight train crossing the highway in front of him. When he saw the train, he removed his foot from the accelerator and let his vehicle decelerate by reason of engine drag and loss of power occasioned by that act. When plaintiff was about 600 feet from the crossing, he saw the caboose of the train clear the highway crossing. He then accelerated to a speed which he estimated at 30 to 35 miles per hour. When he reached a point about 150 feet from the crossing, he looked to the right and saw a north-bound train approaching, which was then about 600 feet south of the crossing. Plaintiff then applied his brakes and guided his vehicle back and forth across the highway attempting to stop. He was unable to stop. The front of his tractor collided with the third unit of the three-unit diesel engine of the north-bound train. A state highway patrolman who investigated the accident testified that there were skid marks on the highway for a distance in excess of 113 feet which led to the rear wheels of plaintiff's trailer-tractor combination. Plaintiff's trailer was 32 feet in length. The over-all length of plaintiff's vehicle was the length of the trailer, plus the length of the tractor which he was driving on that date. It thus appears that plaintiff applied his brakes at a point more than 150 feet west of the crossing. Plaintiff testified that, at the rate of speed at which he was traveling at the time he applied his brakes, it would require anywhere from 150 to 190 feet to bring his tractor-trailer unit to a stop, with the total weight and distribution of the load he was then carrying.

At the place of the occurrence the highway crosses defendant's railroad tracks at approximately a right angle. The crossing is level and is marked by a cross-buck cross-

ing signs and a prior warning sign as required by State statute. The only fixed obstruction of a motorist's view to the South was a house located on the south side of the highway some 500 feet west of the crossing. There also was a depression in the highway which reached its low point some 200 feet west of the crossing which, according to plaintiff's testimony, obstructed plaintiff's view to the south as he traveled down-grade to the low point thereof. The only other obstruction of plaintiff's vision as he approached the crossing on the day in question, was the south-bound train which had just passed over the crossing. In this respect, the plaintiff testified that he first saw the north-bound train when the front of the engine of that train came into view from behind the caboose of the south-bound train. Plaintiff had made numerous trips over Highway 224 between Chicago and New York prior to the day of the accident, although he did testify he had never passed this particular crossing before.

The question is not open to us for decision as a matter of first impression. When we apply the law of Ohio, as we must do, *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, as pronounced by reported opinions of the appellate courts of that State, we must conclude that the trial court erred in denying defendant's motion for a directed verdict.

The law of Ohio relating to the duty of care required of a motorist approaching a railroad grade crossing is succinctly summarized by the Supreme Court of that State in the language from two of its reported opinions as follows:

> "The law recognizes the fact that ordinarily, because of unalterable circumstances, railroad companies in the operation of fast-moving trains, cannot be responsible for grade-crossing collisions, and that the burden of avoiding such collisions rests, for the most part, on the operators of vehicles using such crossings. This rule is made necessary because railroad trains are, in their operation, confined to fixed tracks, and

because of their weight and momentum cannot be readily stopped within a short distance or space of time." *Woodworth* v. *New York C. R. Co.*, 149 Ohio St. 543, 80 N. E. 2d 142, 146.

"When a traveler upon a public highway approaches a steam railway which intersects at grade the highway, with one or more tracks, with an intention of crossing over, it is the duty of such traveler, before going upon the railway, to look both ways and listen for the approach of trains; and such looking and listening must be at such time and place and in such manner as will be effective to accomplish the ends designed thereby. When the view of such traveler in either direction is temporarily obscured by a passing train, smoke, steam, or dust arising therefrom, it is the duty of such traveler to defer his crossing and remain in a place of safety until such obstruction has passed away and a clear view is afforded." *Pennsylvania R. Co.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826.

See to the same effect, *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597; *Toledo T. R. Co.* v. *Hughes*, 115 Ohio St. 652, 154 N. E. 916; *Detroit T. & I. R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714; *Reed* v. *Detroit, T. & I. R. Co.* (Ohio App.), 132 N. E. 2d 776; *Bowman* v. *Baltimore & O. R. Co.* (Ohio App.), 90 N. E. 2d 390; *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448.

A brief review of the factual circumstances shown by the evidence in several of the above cases reveals the strict manner in which the Ohio Courts impose the rule against a plaintiff in grade-crossing collision cases.

In the *Woodworth* case, *supra*, the existence of floodlights in close proximity to a railroad crossing which might be confused with the headlight of an approaching train was held to be a circumstance which required the deceased motorist to take added precautions sufficient to avoid a collision.

It appears from the opinion in *Toledo T. R. Co.* v. *Hughes*, 115 Ohio St. 562, 154 N. E. 916, that the collision occurred at night when automatic warning signals installed at the crossing were not working and when the crossing was obscured by heavy fog. In *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 597, a collision occurred at night, when the atmosphere was heavy and cloudy. A motorist's view down the tracks was limited to some 300 feet until a point quite near the crossing was reached. To an argument that the atmospheric conditions and noise prevented the driver from detecting the approach of the train in time to avoid the collision, the court said that such circumstances merely required him to take greater precautions and, "under such circumstances, to insure his safety, it may have been his duty to stop before going upon the tracks."

Continental Baking Co. v. *Pennsylvania R. Co.* (Ohio App.), 96 N. E. 2d 258, involved a grade-crossing collision which occurred during darkness on a cold, snowy morning, and which involved a train upon which the court found there were no lights burning. The court held the driver guilty of contributory negligence, saying, 96 N. E. 2d at 262: "Plaintiff's driver was bound to listen as well as look as he was about to cross the track. He looked but couldn't see the train because the night was dark and the train was dark. Under the circumstances, it was his duty to listen in such manner as his listening would be effective to warn him of the approach of the train."

In *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448, a driver passed the corner of a building which obscured his view of the tracks, and which was located some 45 feet from the crossing, at a speed of 15 miles per hour. At that time he saw a train approaching and braked his vehicle. He was unable to stop and collided with the train. Custo-

marily, the railroad stationed a flagman at the crossing in question, but it failed to do so on the date of the accident. In commenting upon the evidence, the court said, "The effect of this evidence is that the driver of the appellant's equipment passed a point of visibility at a rate of speed which prevented him from stopping in time to avoid a collision if a train was about to cross the street upon which he was traveling. 10 N. E. 2d at 449. Again at page 450, the court said:

> "It is obvious in the instant case and certainly reasonable minds could not differ that had the driver proceeded past the point where visibility was possible, at a speed permitting him to stop after the existence of the caboose and engine on the track was apparent, no injury would have resulted."

To the same effect is *Bowman* v. *Baltimore & O. R. Co.* (Ohio App.), 90 N. E. 2d 390, where it appeared that the injured plaintiff's view of defendant's tracks was obscured by a concrete pier located in a close proximity thereto and by a rise in ground through which the tracks ran in a sub-surface cut.

In each of the cases hereinabove cited and summarized the court held a claim barred by contributory negligence, principally because the plaintiff was in a position of having first seen an approaching train when it was too late for him to stop his vehicle and avoid a collision at his speed of travel. We think that the case at bar bears no factual distinction from the cited cases.

Here plaintiff approached the railroad crossing in level country. There was no obstruction to his view of the tracks in any feature of the crossing itself. Plaintiff slowed down to let the south-bound train pass over the crossing and then, if his own testimony is to be believed, he started accelerating to go across on the assumption that no other train was coming. When he was approximately 150 feet

from the crossing, and at a point where his brakes would not save him if that assumption were incorrect, he saw the diesel engine of the north-bound train emerge from behind the caboose of the south-bound train. Plaintiff knew that he was approaching a place of danger. Even if he had never seen the crossing before, he was advised of the danger by warning signs marking the approach thereto and by his knowledge of the passage of the south-bound train. Under the circumstances, it was not the exercise of due care for his own safety to proceed toward the crossing at such a speed and in such manner that the brakes of his tractor-trailer would not save him in the event that a second train was approaching the crossing from the south. Applying Ohio law to the facts of this case, we must conclude that plaintiff was guilty of contributory negligence as a matter of law, and that the trial court erred in denying defendant's motion for a directed verdict. *Patton v. Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597; *Cincinnati M. & D. M. Freight Co. v. Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448.

Other errors urged by defendant are not considered.

The judgment is reversed and the cause is remanded to the district court with directions to enter judgment for the defendant and against plaintiff.

SUPPLEMENT B.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Monday, March 14, 1960

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

RAYMOND E. FISHER,
Plaintiff-Appellee,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,
Defendant-Appellant.

No. 12767

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED with costs; and that this cause be, and the same is hereby REMANDED to the District Court with directions to enter judgment for the Defendant and against the Plaintiff.

SUPPLEMENT C.

ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, April 13, 1960

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

RAYMOND E. FISHER, *Plaintiff-Appellee,*

No. 12767 *vs.*

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

ILE COPY

Supreme Court, U.S.
FILED
JUL 13 19
JAMES F. DAVEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 969 112.

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Photograph taken in center of Route 224 about 415 feet
west of the railroad intersection looking east

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Petitioner's statement of questions (pp. 2-4) is incomplete and argumentative. To say that petitioner had no warning to permit him to avoid a collision ignores three signs indicating the approach of the railroad as well as the south bound train that petitioner saw when ¾ of a mile away according to his own testimony.

The question presented is whether there are "special and important reasons" for review by this Court when a Court of Appeals has held that under applicable state law it was contributory negligence as a matter of law for petitioner, knowing of the existence of a railroad when he was ¾ of a mile away, to operate his truck in open country at such a high rate of speed that he was unable to stop

before it collided with a train on the railroad. This is the main question as the case was tried and disposed of in the courts below. The opinion of the Court of Appeals did not reach the question of petitioner's contributory negligence as a matter of law under the "brake" statute of the State of Ohio and the regulations of the Interstate Commerce Commission as explained in this brief (pp. 16-17).

Petitioner's claims of violation of the Seventh Amendment and conflict with Sixth Circuit decisions are of no substance.

REASONS FOR DENYING WRIT.

The Court of Appeals correctly followed the clearly applicable principles of Ohio law that control the result in this case. But even if the decision of the Court of Appeals were erroneous under Ohio law, there is no special or important reason for review by certiorari. This is an ordinary diversity of citizenship case involving an accident at a railroad crossing.

STATEMENT OF THE CASE.

Petitioner's statement of the case (pp. 6-11) needs to be corrected. His statement confuses the facts which are clearly stated in the opinion of the Court of Appeals (i-iii). His statement does not indicate that the evidence of negligence on the part of the railroad was very slight (petitioner's testimony that he did not hear a whistle until the train was 600 feet from the crossing, although he saw he was approaching a railroad in use when he was ¾ of a mile from the crossing). Nor does petitioner's statement disclose the important contradictions in his testimony between his deposition and the first and second trials.

Petitioner's own testimony shows the following:

He was driving a truck east on a main highway in Ohio in the middle of a clear February day. He was taking a heavy load—18 tons of butter—from Chicago to New York. The tractor and trailer with the load weighed 58,000 pounds. The petition describes petitioner as an "experienced driver, aged 27" (p. 8). His testimony was that he had been a chauffeur for only "about one year" (App. 18), although he had made "about 60,000 miles of trips over that road between here (Chicago) and New York" (App. 41).

When ¾ of a mile from a railroad, he saw a *southbound* train crossing the highway ahead of him. From his speed of 40-45 miles per hour, he slowed down (App. 20). At 600 feet from the railroad, going 30 miles an hour, he saw that the train would clear the highway (App. 20). It did clear when he was 200 feet from the railroad, going 30-35 miles (App. 20, 36).* When he was "probably 150 feet"** from the railroad, he saw a *northbound* train 600 feet from the crossing and heard it whistle (App. 20-21). He applied all his brakes. But he was still going two to three miles per hour when the front left corner of the truck collided with the train (App. 20), causing the injuries for which he sued respondent.

There is no doubt he had a clear warning of the approach of the railroad. The photograph reproduced in this brief, taken three days after the accident at about 415 feet west of the railroad, shows the three warning signs (see App. 28, 172).

The controlling fact, nowhere recognized in the petition, is that petitioner was driving this extremely heavy equip-

* On direct examination petitioner testified he was 200 feet from the crossing when the train cleared (App. 20). On cross he said 600 feet (App. 35).

** At the first trial he said "possibly 200 feet" (App. 33).

ment at such a high rate of speed that, when he saw the train while at least 150 feet from the railroad, he was unable to stop before striking the train. The result under Ohio law is clear: his conduct was contributory negligence as a matter of law. This result is as much the law of Ohio as that the defendant was guilty of negligence under the verdict of the jury.

In an effort to excuse his negligence, petitioner raises a false issue. He says he thought there was only a single track of railroad so that, when he saw the southbound train clear the highway, he thought there could be no other train coming. He relies on oral testimony and photographs in evidence in an attempt to show that a dip in the highway obscured the view of the second track (Pet. 9). There are obvious refutations:

(1) If there was a dip or other obstruction that impeded petitioner's view of the dangers of the railroad crossing, it was petitioner's duty to slow down or stop before proceeding. Ohio decisions discussed in the argument make this clear.

(2) When a driver approaches a railroad in fairly level country, he does not see whether there is a single, double, or multiple track until he is very close to the railroad. Here there was even a slight rise up to the right of way (App. 170). Even without the claimed dip, petitioner would not have seen the second track.

(3) Petitioner was wholly and negligently unreasonable if he assumed there was only a single track. Double track railroads are common in this country. Since trains go back and forth, double tracks are commonly provided for traffic in both directions. In approaching a railroad in open country, fully marked as this one was, the driver who assumes a single track is as negligent as if he should assume the train would go only five miles per hour.

(4) Petitioner's claims about the extent of the dip are greatly exaggerated. The photograph inside the front cover of this brief, taken 415 feet west of the railroad, and stipulated to be accurate (App. 30), doesn't show a dip. The scale profile (Def. Ex. 2, App. 170) shows a low point 200 feet west of the railroad, and a rise of four feet to the railroad. Petitioner's witnesses variously estimated the low point to be eight to four feet below the railroad level. But petitioner contends that the obstruction was not from the low point to the railroad, but from 500 feet west to the low point at 200 feet west. The scale profile and all the testimony show the downgrade between these two points to be only *two feet* or 0.6, which is invisible to the naked eye (see App. 63, 74-76, 81). The physical facts thus refute petitioner's dip theory.

(5) It was a late afterthought for petitioner to construct the theory of the dip to excuse his own negligence. The dip was not mentioned in petitioner's sworn deposition or at the first trial. On both of these occasions he said he did not see the *northbound* train because it was on the *wrong* track, *i.e.*, northbound on the *west* track (App. 35, 61). Before the first trial petitioner sa' ! he had thought it safe to cross the tracks because the "blinker lights" went out (App. 69, 94). There never were any such lights at the crossing. The dip theory is just as weak as the earlier theories of the wrong track and blinker lights that petitioner has abandoned.

Other material contradictions that weaken petitioner's entire case are

—his statements that he first saw the northbound train when it was 150 feet and 600 feet from the crossing (App. 21, 98);

—his statements that his truck struck the front of the train and the second engine of the train (App. 40, 41);

—his statements that he was 150 feet from the railroad when he first saw the northbound train and could have been 175 to 200 feet away (App. 33) [skidmarks and other facts stated by *petitioner's* witness indicated the distance to be at least 175 to 250 feet, App. 58, 59, 25].

Petitioner's statement (p. 8) that the charge to the jury was a "very fair one" and placed on plaintiff the burden of proving his own due care overlooks the failure of the charge to contain a clear statement of the governing law of Ohio concerning the duty of a driver approaching a railroad crossing. The charge was objected to on that ground by respondent (App. 136) whose counsel stated that the charge should have explained petitioner's duty to approach the railroad crossing at such speed and with his vehicle under such control that he, when seeing the oncoming train, could have come to a stop to avoid a collision.

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY APPLIED OHIO LAW IN HOLDING PETITIONER GUILTY OF CONTRIBUTORY NEGLIGENCE.

Ohio Case Law.

The Ohio cases make it clear that the law in Ohio on railroad crossings is strict. The traveler on a highway is under a heavy obligation to keep his vehicle under control as he approaches a railroad so that he can stop to avoid a collision. The rule may be different in other jurisdictions, but in this case the Court of Appeals had no option but to apply Ohio law. In so doing, it correctly found that plaintiff was guilty of contributory negligence as a matter of law. There is no doubt that an Ohio court would have reached the same result.

Here petitioner knew he was approaching a railroad. He knew that the railroad was used by trains. He saw the southbound train crossing the highway when he was three-quarters of a mile from the railroad. The train was still crossing the highway when he was 600 feet away.

If petitioner's view of the second, the northbound, train was obscured until he reached a point 150 feet to 175 feet from the railroad, he was then guilty of contributory negligence in not being able to stop before striking the train. Ohio law is clear on the duty of a driver attempting to cross a railroad after a train has passed. The author of the excellent summary of Ohio law in 15 Ohio State Law Journal 361 (1954) points out its relative stringency, and then discusses holdings that are applicable to this case (pp. 373, 375):

"If a railroad has not placed any extra-statutory signals (electric warning devices, gates, or watchmen) at a crossing, then the rule is quite clear that the traveler must exercise his sense of sight and hearing in such a manner as to be effective. Stated in different terms, the traveler must look and listen from the last place where he could avoid injury. . . . *Yet, if a clear view of the track can only be made possible by stopping, then such action is mandatory as a matter of law.* However, the mere fact that the traveler did stop, look and listen will not discharge his duty if the exercise of looking and listening was not made from a point where it would have been effective. For instance, the Ohio courts have held that where the crossing is obstructed, a traveler can be negligent as a matter of law where he looks in both directions from a distance of 60 feet, 10 feet, and 5 to 10 feet, whether the traveler stops or not." (Emphasis added.)

. . . . . .

"Another justification for failing to discern an approaching train is premised on the basis that the view of the right-of-way was obstructed. Temporary obstructions such as smoke, steam, *or passing trains* do not justify driving a vehicle onto the railroad track. The traveler must wait until such temporary obstructions cease. *Failure to wait under such conditions constitutes negligence as a matter of law.* (*Penna. Rd.* v. *Rusynik*, 117 Ohio St., 159 N. E. 826 (1927); *Eschenbach* v. *Hines*, 23 Ohio N. P. (N. S.) 255 (1921).)" (Emphasis added.)

The burden of avoiding collisions at railroad grade crossings rests primarily upon the traveler. *Woodworth* v. *New York Cent. R. Co.*, 80 N. E. 2d 142, 147 (Ohio, 1948). And where the dangers at a railroad crossing are increased by conditions obstructing the vision, a greater duty of care is imposed upon one about to pass over the crossing.

Woodworth v. *New York Cent. R. Co.*, 80 N. E. 2d 142, 147 (Ohio, 1948).

Bowman v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390, 392 (Ohio, 1949).

Continental Baking Co. v. *Pennsylvania R. Co.*, 96 N. E. 2d 258, 262 (Ohio, 1950).

The general rules governing a traveler's duty in approaching a crossing behind a passing train are set forth in the leading case of *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio, 1927). The court stated that, when a passing train is upon the track nearest the traveler, he must be alert to the fact that a train may be approaching from the opposite direction and completely hidden by the train on the first track. The court said (p. 828):

> "... *it is not the exercise of ordinary care for his own safety on the part of the traveler to await only until the passing train shall have cleared the crossing and then to go forward without waiting to ascertain whether another train is approaching the crossing on a track beyond that of the passing train.* Time must be given to permit the passing train to get so far beyond the crossing that the traveler, *while halted in a place of safety*, may be afforded a clear view of the track or tracks in both directions, that he may thereby know whether a moving train is in close proximity to the crossing thereby endangering any attempt he may make to cross the tracks in front of such approaching train. The omission of such caution on the part of the traveler will constitute contributory negligence on his part sufficient to bar any recovery for damages against the railway company for injuries which he may sustain in a collision with a train, due to his omission to exercise the caution stated; and this is true, notwithstanding the fact that the employees of the railway company have neglected to give the signals of the train's approach to the crossing, required by law to be given." (Emphasis added.)

This *Rusynik* case has been cited and followed in many later cases, as *Giglioth* v. *New York, Chicago & St. L. R. Co.*, 157 N. E. 2d 447 (Ohio, 1958).

Viewing the evidence in the light most favorable to the petitioner, it is apparent that he saw the northbound train when he was about 150 to 175 feet from the crossing, yet he was going at such a high rate of speed that he was unable to stop his extremely heavy truck before striking the train. Ohio cases holding that a motorist must approach a crossing with his vehicle under full control so that he can stop in time include the following:

C. M. & D. M. F. Co. v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio, 1937).

Shook v. *Wheeling & L. E. R. Co.*, 31 N. E. 2d 255 (Ohio, 1936).

Lynch v. *Penn. R. Co.*, 194 N. E. 31, 32 (Ohio, 1934).

The *L. & N.* case, in which conduct such as petitioner's here was held contributory negligence as a matter of law, is squarely in point. A truck driver was going east on a Cincinnati street in a truck and trailer with a total loaded weight of 52,300 pounds. The view of the tracks was obstructed until he was 45 feet from the railroad, when he saw the oncoming train. He was then going 15 m.p.h. He swung his truck back and forth across the street just as petitioner in the present case, but he was unable to stop. He testified it would take him 45 feet to stop when he was 45 feet from the railroad. Similarly in the present case petitioner testified it would take him 175-190 feet to stop when he was 150-175 feet from the railroad on which the oncoming train became visible. The driver in the *L. & N.* case knew a flagman was customarily at the crossing, but none was present as he approached. In holding the driver guilty of contributory negligence as a matter of law, the court said of this fact (pp. 449-450):

> *"The effect of this evidence is that the driver of the appellant's equipment passed a point of visibility at a*

rate of speed which prevented him from stopping in time to avoid a collision if a train was about to cross Front Street at that point.

"The distance from this point, the Jones & Laughlin building, was 45 feet. It required 45 feet to bring the equipment to a stop at the speed at which the equipment was permitted to pass such point.

"*It is obvious in the instant case and certainly reasonable minds could not differ that had the driver proceeded past the point where visibility was possible, at a speed permitting him to stop after the existence of the caboose and engine on the track was apparent, no injury would have resulted. . . .*

"To hold that in the instant case, the case should have been submitted to a jury is in effect holding that a jury would have been justified in finding no evidence of contributory negligence, although the driver had deliberately passed a point where he could have seen the approaching caboose and engine and stopped his equipment if he had been proceeding at a speed permitting him to do so." (Emphasis added.)

In the present case the accident occurred solely because petitioner drove his truck forward, neither looking nor listening when looking and listening would have been effective, at such a rate of speed that, when he saw the train, he was unable to stop even though he was then at least 150 feet from the railroad. Knowing his view was temporarily obscured by the passing southbound train, he had entered the area in which his brakes would not stop him in time. He either paid no attention, gambling that no other train was coming, or negligently assumed that there was only one track at the crossing. The cases are legion in which a driver was held negligent as a matter of law for driving on railroad tracks when his view of oncoming trains finally cleared at distances as little as 10 feet to 20 feet from the crossing (See 15 Ohio State L. J. 361, 373 *et seq.*)

In *Jollay* v. *Pennsylvania R. Co.*, 38 N. E. 2d 204, 206 (Ohio, 1941), the court said:

> "If an oncoming train may be observed for a distance of a thousand feet by an approaching automobile when it is 100 feet from the crossing, we would be required to say as a matter of law that this afforded ample opportunity to a driver who was observing ordinary care in approaching a known railroad crossing to bring his automobile safely to a stop before reaching the crossing."

Petitioner's repeated contentions that he thought there was only a single track and that a dip in the road prevented him from seeing the second track have been refuted above in the Statement of the Case. In addition, with Ohio law requiring him to prove his due care, it was necessary for him to establish that he was justified in believing that there would be only one track on a railroad. He argues (p. 12) that there is "no presumption of law that tracks are double-tracks and it was for the jury to say whether under all the circumstances the plaintiff was justified in acting on his belief that the crossing here was a single track". This claim overlooks the rule that he had the burden of proving his reasonable care, not in accordance with his subjective belief, but with an objective standard of reasonableness. This burden was not met.

Petitioner (pp. 22-23) relies primarily on four decisions, all of which are irrelevant to this case. *Cleveland C. C. & I. Railway Company* v. *Schneider*, 17 N. E. 321 (1888), is a leading case on the one exception to the general Ohio rule of law requiring drivers to approach a railroad with extreme care. That is where the railroad invites the traveler to cross the tracks either through raised crossing gates, a signaling flagman, or inoperative flasher lights. In the *Schneider* case the crossing gates were up. The court held that the raised crossing gates constituted an invitation to the driver. In *Thomas* v. *Pennsylvania R. R. Co.*, 45 N. E. 2d 776 (1942), a flagman, posted to warn travelers of approaching trains, invited a driver to enter upon the tracks.

In *Eastern Motor Dispatch, Inc.* v. *Pennsylvania R.R.*, 77 N. E. 2d 275 (Ohio, 1947), a watchman gave the driver a signal to cross the tracks. There too, the accident occurred in the nighttime with the view obstructed by the defendant and a fast train operated along the tracks. In *New York Cent. R. R. Co.* v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958), the accident occurred in the nighttime at a multiple crossing with a train traveling at seventy miles per hour. The blinker lights protecting the crossing were not operating. Under those circumstances, a divided court applying the exception of the *Schneider* case found there had been an invitation to the plaintiff to cross the tracks and that he was not guilty of contributory negligence at a matter of law.

It is obvious from the facts in these four cases that they are not applicable to the situation here where petitioner approached a known railroad crossing in broad daylight with no special invitation from the railroad company that would remove the burden imposed on him by Ohio law. To this situation is applicable the stringent Ohio law governing the conduct of a driver approaching a crossing at which there are no extraordinary safety devices, 5 Ohio State L.J. 361, 373.

Petitioner attempts to distinguish the controlling Ohio cases by claiming that in them the plaintiffs knew the extent of the danger because they were familiar with the crossings, whereas here petitioner was not familiar with the crossing. In none of the Ohio cases, however, is the fact of familiarity with the crossing of controlling importance. In the *L. & N.* case cited above, 10 N. E. 2d 448 (1937), familiarity with the crossing was claimed to create an excuse, not to impose an obligation on the driver. Because of his familiarity with the crossing, he knew it was customarily protected by a flagman. When he saw no flagman at the crossing, the truck driver reasonably, one might say,

assumed no train was coming. But the Ohio court held that the driver passed a point of visibility at a rate of speed which prevented him from stopping in time to avoid a collision if a train were about to cross the road. Familiarity with the crossing in that case led the plaintiff into a position of danger rather than the reverse.

In *Reed* v. *Detroit T. & I. R. Co.*, 132 N. E. 2d 776 (Ohio, 1955), the fact of familiarity although briefly mentioned was not even alluded to when the court talked about the law requiring a finding that plaintiff was guilty of contributory negligence. Petitioner admits that in *Bowman* v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390 (Ohio, 1949), familiarity with the crossing was not an element. Other Ohio cases ignore the question of familiarity. In *Hubbard* v. *Pennsylvania R.R. Co.*, 232 F. 2d 631 (C.A. 6, 1956), a case very similar on its facts to the instant one, the decedent operated his truck so as to crash into the side of the tender of an engine while traveling at a high rate of speed under conditions of good visibility. There were signs warning of the existence and proximity of the crossing. Since the court pointed out that the signs told of the presence of the railroad crossing, the court did not base its holding on the driver's familiarity with the crossing.

Moreover, petitioner mistakes the significance attached to familiarity with the crossing. Familiarity charges a traveler with knowledge that the crossing is there, and that it is used by trains. See *Toledo Terminal R.R. Co.* v. *Hughes*, 154 N. E. 916, 919 (Ohio, 1926); 15 Ohio State L.J. 361, 373. Much the same argument as petitioner now makes was made in *Lynch* v. *Pennsylvania R.R. Co.*, 194 N.E. 31, 32 (Ohio, 1934), where the court held that despite the claimed lack of familiarity with the crossing, plaintiff was guilty of contributory negligence since the driver could see that the crossing was there. In *Hubbard* v. *Pennsylvania R.R. Co.*,

232 F. 2d 631 (C.A. 6, 1956), without discussing familiarity, the court found the truck driver guilty of negligence since he knew, or should have known, "of the existence and proximity of the crossing."

Even the case stressed by petitioner (pp. 26-27), *Zivkoff* v. *Pennsylvania R. R. Co.*, 90 N. E. 2d 148, 153 (Ohio, 1948), pointed out that familiarity with a crossing relates to knowledge of the presence of the crossing. There the accident happened at night at a crossing with four tracks with the view obscured up to the time the traveler reached the tracks. *Trees obscured the warning sign which would have alerted a traveler to the presence of a crossing.*

In *Biery* v. *Pennsylvania R. R. Co.*, 99 N. E. 2d 895 (Ohio, 1951), there was an eleven track crossing, with obstructions on the right of way created by defendant, and the train involved in the accident was traveling at 70 m.p.h.

Petitioner fails to cite one Ohio decision with facts similar to those presented here. He places total reliance on cases illustrating well known exceptions to the Ohio general rule—cases involving an invitation to the traveler to proceed either by raised gates, a beckoning flagman, or stilled flashers. No exception applies here.

The *L. & N.* case, 10 N. E. 2d 448 (Ohio, 1937), is on all fours with this case and is controlling here. And the Ohio cases generally indicate the same result. It is clear that an Ohio Court would unhesitatingly hold that the petitioner in this case was guilty of contributory negligence as a matter of law, and that a verdict should have been directed for the defendant accordingly.

Applicable here is the comment in *Ballmer* v. *Pennsylvania R. Co.*, 17 N. E. 2d 435, 438 (Ohio, 1938):

> "In this age of numerous and often speedy motor vehicles on the highway, our courts are not inclined by their judgments to encourage highways travelers to engage in a race with death at railroad grade crossings."

Ohio Statute.

An Ohio statute provides (Page's Ohio Revised Stat. Ann., Sec. 4513.20(G):

> "Every * * * motor vehicle or combination of motor-drawn vehicles shall be capable at all times and under *all conditions of loading* of being stopped on a dry, smooth, level road free of loose material, upon application of the service or foot brake, within the following specified distances, or shall be capable of being decelerated at a sustained rate corresponding to these distances:
>
> > "(1) * * * [V]ehicles or combinations of vehicles having brakes on all wheels shall come to a stop in thirty feet or less from a speed of twenty miles per hour." (Emphasis added.)

Petitioner testified that at 30 miles per hour it would take him from 150 to 175 feet to stop his truck (App. 38, 61, 192). It is obvious that he was driving a truck that was not equipped with brakes capable of stopping it within 30 feet at 20 miles per hour. In applying a similar Illinois statute, the Supreme Court of Illinois, in *Moudy* v. *N. Y., C. & St. L. R. R. Co.*, 385 Ill. 446, 451 (1944), held that it was the duty of the plaintiff to comply with the statute and that the proximate cause of an accident was the contributory negligence of the plaintiff in operating his vehicle at such a rate of speed that it could not be stopped when the train was seen. It has been held by the courts of Ohio that a violation of a statute is negligence *per se*.

> *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio, 1927).
>
> *Patton* v. *Pennsylvania R. Co.*, 24 N. E. 2d 597, 600 (Ohio, 1939).

The Ohio statute calls for the same result reached by the Court of Appeals.

Regulation of Interstate Commerce Commission.

An additional ground supporting the judgment below is the fact that petitioner was a driver of a truck engaged as a common carrier in interstate commerce. Pursuant to the Interstate Commerce Act (49 U. S. C. 304, Appendix to this brief, p. 32), the Interstate Commerce Commission has issued regulations concerning the safety of motor carrier operations. One of the regulations, in effect in 1954 and binding on petitioner, reads as follows (49 Code of Federal Regulations, § 192.11, Appendix 32):

> "Every motor vehicle . . . shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear."

Section 192.3 provides that even though state law may provide for a less strict standard, the commission regulations are binding upon the driver. It is apparent that petitioner did not obey the safety rule laid down for his protection. He was, by law, bound to obey that rule. His failure to do so caused this accident and was contributory negligence as a matter of law.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT.

It is significant that, while citing two cases in support of his assertion that there is a conflict between circuits, petitioner (pp. 28-30) does not set forth the facts in the cases. They are so dissimilar that no actual comparison with the present case is possible.

Northwest Airlines v. *Glenn L. Martin*, 224 F. 2d 120

(C. A. 6, 1955), was not a railroad crossing case nor even a suit for damages for a negligent physical injury. Plaintiff airline sued defendant manufacturer for selling airplanes which contained a hidden structural defect. Defendant claimed that if it was negligent in manufacturing the planes, the plaintiff was negligent in not making an inspection to discover the defect. In disposing of this contention, the Sixth Circuit pointed out that it is not contributory negligence to fail to look out for danger *where there is no reason to apprehend any.* However, under Ohio law, a railroad crossing is a place of known danger. And as shown by many cases cited in Point I, the negligence of the railroad does not excuse a traveler from his obligation to use due care when approaching a crossing. *CM & DMF Co.* v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio 1937); *Pennsylvania R. Co.* v. *Rusynik*, 159 N. E. 826 (Ohio, 1927); 15 Ohio State L. J. 361 (1954).

N. Y. Central RR. Co. v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958), is similar to this case only in that both are railroad crossing cases. There the accident happened at night, the train was traveling at 70 miles per hour, and *flasher lights were not working.* A divided court, holding that the plaintiff was not guilty of contributory negligence as a matter of law, based this result on the exception created by the early *Schneider* case (p. 524):

> "By the silence of the signal he was entitled to rely upon the indication of safety given by the failure of the flashers to operate. *Cleveland, C., C. & I. Railway Company* v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321, 322."

This is an application of the rule in Ohio where the railroad has undertaken to give extra-statutory warnings such as gates, flashers, flagmen, etc. and the extra-statutory warnings are not working. It has no application to a case such as ours where there is no failure of additional

warning devices. In such cases the rule is that pointed out in 15 Ohio State L. J. 361, 373, 375:

"If the railroad has not placed any extra-statutory signals (electric warning devices, gates, or watchmen) at a crossing, then the rule is quite clear that the traveler must exercise his sense of sight and hearing in such a manner as to be effective. Stated in different terms, the traveler must look and listen from the last place when he could avoid injury. This locus would be just before going onto the track or far enough away that the traveler could cross the track in safety from that particular point; or if after starting across the tracks, the traveler could by the exercise of ordinary caution avoid the accident, this is then the place of effective looking. For example, if the driver can ascertain whether the track is clear without bringing the vehicle to a stop, then he has no duty to stop. *Yet, if a clear view of the track can only be made possible by stopping, then such action is mandatory as a matter of law.* However, the mere fact that the traveler did stop, look and listen will not discharge his duty if the exercise of looking and listening was not made from a point where it would have been effective. For instance, the Ohio courts have held that where the crossing is obstructed, a traveler can be negligent as a matter of law where he looks in both directions from a distance of 60 feet, 10 feet, and 5 to 10 feet, whether the traveler stops or not." (Emphasis added.)

"Another justification for failing to discern an approaching train is premised on the basis that the view of the right-of-way was obstructed. Temporary obstructions such as smoke, steam, *or passing trains* do not justify driving a vehicle onto the railroad track. The traveler must wait until such temporary obstructions cease. *Failure to wait under such conditions constitutes negligence as a matter of law.* (*Penna. Rd.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826 (1927); *Eschenbach* v. *Hines*, 23 Ohio N. P. (N. S.) 255 (1921).)" (Emphasis added.)

The distinctive facts in the *Delich* and *Northwest Airlines* cases rebut the argument that the decisions in those cases are inconsistent with the decision in the instant case. Moreover, the Sixth Circuit, in a recent decision involving facts more nearly pertinent to those in the instant case, concluded as a matter of Ohio law that a truck driver was guilty of contributory negligence as a matter of law. In *Hubbard* v. *Pennsylvania RR. Co.*, 232 F. 2d 631 (C. A. 6, 1956), the plaintiff drove his truck into the side of a tender at a time when the tender and locomotive were being backed across the road. The court held (p. 632):

> ". . . the decedent so operated his truck as to crash into the side of the tender while traveling at a high rate of speed under conditions of good visibility and *cautionary warnings of the existence and proximity of the crossing*, constituting contributory negligence as a matter of law." (Emphasis added.)

So in the instant case the petitioner had knowledge of the existence and proximity of the crossing. Yet he continued to operate his truck toward an obstructed crossing on which a train was passing and he drove at such a rate of speed that, when the oncoming train appeared, he could not stop and crashed into the side of the train.

The result reached here by the Seventh Circuit is thus in accord with a relevant decision of the Sixth Circuit, and there is no inconsistent decision of the Sixth Circuit.

III.

THE SEVENTH AMENDMENT WAS NOT VIOLATED BY THE COURT OF APPEALS.

Petitioner contends (pp. 13-22) that the Court of Appeals "re-examined" the facts and therefore violated his rights under the Seventh Amendment of the Constitution of the United States. If petitioner's argument were sound,

the Seventh Amendment would forbid the Court of Appeals to reverse any judgment based on a jury verdict and enter judgment for the loser in the trial court.

The Seventh Amendment provides that any fact tried by a jury shall not be re-examined in any court in the United States other "than according to the rules of common law". At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved. Under this practice, both the District Court and the Court of Appeals have authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation. In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 (1934), the plaintiff recovered a verdict from a jury, judgment was entered on the verdict, and the District Court rejected the motion for judgment notwithstanding the verdict. The Court of Appeals reversed but ordered a new trial under the impression that it could not enter judgment for the defendant. This court held, however, that the Seventh Amendment did not prohibit a Federal Court in applying state law to reverse and enter judgment for the defendant when, by state law, defendant was entitled to such a judgment. *Galloway* v. *United States*, 319 U. S. 372, 393 (1943), repeated the holding that the Seventh Amendment did not foreclose the power of the court to determine the legal sufficiency of the opposing case.

Petitioner confuses two different things, (a) a violation of the guaranty of trial by jury and (b) the possible error that a court may commit in examining the evidence to determine whether, viewed in the light most favorable to petitioner, he has fulfilled his obligation to prove his case.

If there is error, it is committed in carrying out the provisions of the Seventh Amendment and not in contravening them. As Judge Magruder said in *Smith* v. *Reinauer Oil Transport*, 256 F. 2d 646, 649 (C. A. 1, 1958):

> "If an Appellate Court is of the view that the trial judge made an error of judgment in entering judgment for the defendant notwithstanding a plaintiff's verdict . . . we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment."

Similarly, no such constitutional violation occurs when the Court of Appeals, acting under the Seventh Amendment's reference to "the rules of the common law", holds that as a matter of law the trial judge erred in denying a motion for judgment notwithstanding the verdict.

Petitioner attempts (pp. 13-14) to equate an ordinary railway crossing case governed by state law to cases under the Federal Employers' Liability Act, in which a jury verdict is proper if a railroad employer's negligence played any part, even the slightest, in producing the injury. *Rogers* v. *Missouri Pacific*, 352 U. S. 500, 509, 510 (1957), explained that Congress, dissatisfied with the common law, "vested the power of decision in these actions exclusively in the jury in all but infrequent cases" and that there were "special features of this statutory negligence action which makes it significantly different from the ordinary common-law negligence action".

The Federal Employers' Liability Act expressly provides that the plaintiff's contributory negligence "shall not bar a recovery" but merely diminish the damages fixed by the jury (45 U. S. C. 53). In the present case contributory negligence is a bar under the applicable Ohio law. It is therefore apparent that cases under the Federal Employers' Liability Act are irrelevant here. *Pennsylvania*

R. R. v. *Goldie*, 182 F. 2d 9, 12 (C. A. 6, 1950), quoted by petitioner for a contrary statement (p. 14), was greatly narrowed in the later Sixth Circuit case of *O'Donnell* v. *Geneva Metal Wheel Co.*, 190 F. 2d 59 (C. A. 6, 1950).

Much of petitioner's argument on the Seventh Amendment (pp. 15-22) is merely an attack on the decision of the Court of Appeals that the evidence, viewed most strongly in petitioner's favor, established his contributory negligence as a matter of Ohio law. Petitioner's contentions are answered by the record and the Ohio law.

Petitioner claims (p. 15) that the evidence posed three questions, all of which the jury verdict is said to have answered favorably to petitioner:

> (1) Whether the dip in the road obstructed petitioner's view of the second track.

The Court of Appeals accepted as true petitioner's claim that the dip was an obstruction to the view (Pet. iii), but pointed out that under Ohio law the presence of an obstruction imposes on a traveler an obligation of greater care. *Bowman* v. *Baltimore & Ohio R. R. Co.*, 90 N. E. 2d 390 (Ohio 1949); *Pennsylvania R. R. Co.* v. *Rusynik*, 159 N. E. 826 (Ohio 1927).

> (2) Whether the "undoubted failure" of the respondent to give warning that the crossing comprised two tracks relieved petitioner of the burden of stopping, looking and listening.

As the Ohio cases cited by the Court of Appeals point out, the failure of a railroad to give warning does not relieve a driver of his duty to stop, look or listen. *Pennsylvania R. R. Co.* v. *Rusynik*, 159 N. E. 826, 828 (Ohio 1927); *C. M. & D. M. F. Co.* v. *L. & N. R. R. Co.*, 10 N. E. 2d 448 (Ohio App. 1937); 15 Ohio State L. J. 361 (1954). Moreover, petitioner's claim that the railroad failed to warn him of a two-track crossing is fallacious in fact as well as

theory. Petitioner contends that the cross-buck sign should have included a statement of "two-tracks". But by the time petitioner had reached the point at which he could have read the cross-buck sign, he had already seen the train and was traveling at such a speed that he could not stop his extremely heavy equipment before hitting the train. It is noteworthy that the type of sign with markings present at this crossing is prescribed by statute and found at most double track crossings in Ohio. Page's Ohio Revised Stat. Ann. Sec. 4955.33, quoted App. to this brief, p. 31; see *Hood* v. *N. Y. C. & St. L. R. R. Co.*, 144 N. E. 2d 104, 108 (Ohio, 1957); *Woodworth* v. *N. Y. C. R. R. Co.*, 80 N. E. 2d 142, 146 (Ohio, 1948).

(3) Whether the combination of the purported dip in the highway, the appearance of the crossing, the failure to post a two-track sign, and the alleged failure to whistle would support a finding that plaintiff was not guilty of contributory negligence.

All these factors were argued by petitioner in the Court of Appeals, were considered by the Court, and were rejected as a matter of Ohio law. The failure to signal and warn, under Ohio law, does not relieve a driver of his burden of approaching a crossing with his vehicle under control.

Petitioner argues (pp. 16-17) as if the Court of Appeals rejected petitioner's theory that the claimed dip obstructed his view. In fact the opinion accepted his testimony at face value (see Pet. iii). Petitioner ignores the fact, shown above in Point I, that the dip in the highway under Ohio law placed petitioner under an obligation to use increased care. Whether or not the dip obstructed the view, he was guilty of contributory negligence as a matter of law.

But in fact the dip in the highway did not impede petitioner's view of the *second tracks*. He never so testified.

Plaintiff's Exhibit 1, a photograph taken near the bottom of the so-called dip, makes it apparent that there was more than one set of tracks (App. 139). Defendant's Exhibit 4, set forth at the beginning of this brief, shows a crossing at which the tracks could be either single or double. To argue that the dip concealed the second set of tracks ignores the fact that, from a distance, the first set of tracks will always conceal the second set of tracks at any crossing. This is true because the tracks lie in a horizontal plane and only the near tracks are presented to the eye.

There was no failure of defendant to warn petitioner that the crossing had two tracks since he, as an experienced traveler, must have known that most railroads in the country are double-tracked.

The Court of Appeals did not contradict the jury verdict in stating that the petitioner approached the railroad crossing in level country. The exhibits (Plaintiff's Exhibit 1, Defendant's Exhibit 4, and Defendant's Exhibit 2, App. 170, all stipulated to be accurate) demonstrate that there was no substantial variation in the level of the countryside.

Petitioner (p. 18) criticizes the statement by the Court of Appeals that the petitioner "started accelerating to go across on the assumption that no other train was coming". Petitioner even says, "There is no testimony that plaintiff accelerated" (p. 18). Petitioner himself testified that he was "down in the 30-mile range" when 600 feet from the crossing, and "somewhere around 30 to 35 miles an hour, between there" when 200 feet from the crossing (App. 36). Petitioner's own testimony thus shows acceleration, particularly since the 200 feet point was the lowest part of the dip. And petitioner admitted that when the southbound train crossed the highway, he "dropped into fourth gear and proceeded to cross the crossing" (App. 94). This admission was never qualified and can have no

other meaning but that petitioner accelerated. Moreover, under Ohio law, it makes no difference whether he accelerated or continued at the same speed. He approached a known railroad crossing at such a rate of speed that he was unable to stop even though he had warning more than 175 feet from the crossing that a train was coming. This is contributory negligence as a matter of law in Ohio.

The curious reasoning on pages 19-20 of the Petition demonstrates the lack of merit in petitioner's contention that he was justified in believing there was only a single track. According to his own story, at the time he entered into the dip which obstructed his view, the crossing could have been either a single or a double track. He proceeded on at the same rate of speed even though he had no basis on which to conclude the track was one or two. Only when he reached a point at which he was unable to stop his heavy truck at his speed and when he saw the oncoming northbound train was he able to read a sign which, according to him, failed to warn him that there were two tracks.

Under the law of Ohio, shown by clear precedents cited in Point I above, if a traveler on the highway has knowledge of the existence of a railroad crossing which is occupied by a passing train, he must approach the crossing with the expectation that another train bound in the opposite direction may be concealed behind the train that he sees. Here it is clear beyond doubt and by petitioner's own admission that he disregarded the possibility of the second train. The Court of Appeals was clearly right in holding him guilty of negligence as a matter of law.

IV.

PETITIONER HAS NOT SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW ON A WRIT OF CERTIORARI.

The decision of the Court of Appeals is, as we have shown, in conformity with Ohio law and the decisions of the Sixth Circuit applying that law. Even if it were not, however, the disagreement would not constitute a "special and important reason" for granting a writ of certiorari as required by Rule 19(1) of the Rules of this Court. In every case in which State law is applied by a Court of Appeals, the contention can be made that the decision conflicts with decisions of the State Courts or of another Circuit. However, unless some matter more important than the private interests of the litigants is shown, the mere fact of asserted conflict in applying State law is insufficient to warrant certiorari. In *Baxter Admr.* v. *Continental Casualty Co.*, 284 U. S. 578, 579 (1931), this Court observed:

> "As the decision of the Circuit Court of Appeals merely applied the law of the State, no question is present which gives this Court jurisdiction of the appeal."

The Court said in *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938) that "as to questions controlled by State law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Cases decided on one set of facts may appear on the surface to conflict with other cases decided on different facts. For the Court to issue a writ of certiorari in a case such as we have here would commit the Court to a policy of analyzing and applying the laws of the 50 states. That, however, is the function of the Courts of Appeals. In the past this Court has refused to grant certiorari in cases in

which the same arguments were made as are presented here:

Wheat v. *Baltimore and Ohio Ry. Co.*, 262 F. 2d 289, cert. den. 359 U. S. 1005.

T&P Ry. Co. v. *LaBorde*, 257 F. 2d 587, cert. den. 358 U. S. 928.

Illinois Central RR. Co. v. *Underwood*, 235 F. 2d 868, cert. den. 352 U. S. 1001.

To do otherwise would be to take over the function of the Court of Appeals and burden the Court with the kind of docket congestion that would make it difficult, if not impossible, for the Court to give proper attention to the cases which the Court is intended to adjudicate.

Here the Court of Appeals carefully analyzed the record and concluded, as was its duty, that under Ohio law petitioner was guilty of contributory negligence as a matter of law. In this situation this Court should "leave undisturbed, by denying certiorari, decisions of the Court of Appeals involving solely a fair assessment of the record on the issue of unsubstantiality." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1951).

The present case is an ordinary open country railroad crossing accident of the type handled with competence and careful attention by the Courts of Appeals as part of their everyday business. To the task of examining the record in the light of the applicable law they bring a thorough experience in dealing with evidence and determining its sufficiency to go to the jury.

The Court of Appeals was constrained to follow Ohio law under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). It examined the evidence in the light most favorable to petitioner. The conclusion that, under the Ohio cases, the evidence established petitioner's contributory negligence as a matter of law is not one which there are "special and important reasons" for this Court to review.

CONCLUSION.

The foregoing shows the reasons set forth in the petition for granting the writ of certiorari are without merit. Respondent urges the writ be denied.

Respectfully submitted,

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APPENDIX.

Page's Ohio Revised Stat. Ann., Sec. 4513.20 provides:

Brake Equipment

The following requirements govern as to brake equipment on vehicles:

* * * * *

(G) "Every trackless trolley, motor vehicle, or combination of motor-drawn vehicles shall be capable at all times and under *all conditions of loading* of being stopped on a dry, smooth, level road free of loose material, upon application of the service or foot brake, within the following specified distances, or shall be capable of being decelerated at a sustained rate corresponding to these distances:

"(1) Trackless trolleys, vehicles, or combinations of vehicles having brakes on all wheels shall come to a stop in thirty feet or less from a speed of twenty miles per hour."

Sec. 4955.33:

Warning Signs

Sec. 4955.33. *Warning Signs at public road grade crossing.*

"At all points where its railroad crosses a public road at a common grade, each company shall erect a sign with large and distinct letters placed on it to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive. A company which neglects or refuses to comply with this section is liable in damages for all injuries which occur to persons or property from such neglect or refusal."

Interstate Commerce Act, 49 U. S. C., Sec. 304:

"304. General duties and powers of the Commission.—(a) Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part [§§ 301-305, 306-327 of this title], and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

The Interstate Commerce Commission regulations provide:

49 C. F. R. Part 192. *Driving of Motor Vehicles.*
Section 192.3. *Driving Rules to be obeyed.*

"Every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless such laws, ordinances and regulations are at variance with specific regulations of this Commission which impose a greater affirmative obligation or restraint."

Section 192.11. *Railroad grade crossings; slowing down required.*

"Every motor vehicle other than those listed in Section 192.10 shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. [redacted]

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 969.

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In reply to the brief of the defendant-respondent, the plaintiff-petitioner respectfully submits:

I.

The Defendant's Answer Comprises an Attack on the Credibility, Not the Sufficiency, of Plaintiff's Evidence.

We respectfully submit that the defendant's answer to our Petition for Certiorari clearly indicates that the Court of Appeals improperly weighed the evidence and reviewed the jury's verdict and in so doing erroneously (1) drew all inferences unfavorably to the plaintiff, (2) resolved all conflicts in the evidence in favor of the defendant and against the plaintiff, (3) viewed all of the evidence *most unfavorably to the plaintiff*, and (4) viewed all of said

evidence most favorably to the defendant, all contrary to the decisions of this Court dealing with the function of a court of appeal on review of a jury verdict.

In order to support the decision of the Court of Appeals in setting aside the second jury verdict for the plaintiff and the trial court's judgment thereon, the defendant in its Statement of the Case (Brief in Opposition to Petition, pp. 3-6, both inclusive) argues the facts as determined by the Court of Appeals.

The very fact that the defendant precedes its brief with a photograph (Defendant's Exhibit No. 4)—which it admits (p. 25) is even less favorable to its position than the exhibit (Plaintiff's Exhibit 1) attached to our Petition for Certiorari—and many of defendant's other arguments prove that the question of the plaintiff's exercise of due care was a proper question of fact for the jury.

The defendant's brief is filled with arguments attacking the credibility, not the sufficiency, of plaintiff's evidence. In fact, its entire Statement of the Case (pp. 3-6) is simply a jury argument attempting to refute the plaintiff's evidence (p. 4), claiming that it is "greatly exaggerated" (p. 5), that it was a "late afterthought" (p. 5), and that it contained "material contradictions that weaken petitioner's [plaintiff's] entire case" (p. 5).

The defendant also contends (p. 4) that the plaintiff was negligent in that he "assumed" that there was a single track, and later in its brief (p. 25) makes the argument that the plaintiff "as an experienced traveler, must have known that most railroads in the country are double-tracked." That was a question for the jury. It is not a matter of judicial notice. The jury could properly determine and did determine that the plaintiff had the right to conclude from all of the facts in the instant case, as they appeared to him—including the lack of any blinker lights

or customary warning signs stating that there was more than one track—that there was only one track.

The defendant's argument (p. 25) that the railroad crossing was in level country disregards entirely the testimony to the contrary summarized in our Petition (pp. 15-16).

Defendant erroneously states (p. 26) that a warning sign (of more than one track) would have been useless because that warning would have been too close to the tracks to be adequate warning to the plaintiff. Whether this would have been true was a jury question. We have never contended that the warning of the existence of more than one track should have been contained on the cross-buck sign, too late and too small to be effective. Our point is that the omission of an *effective* warning that there was more than one track was one of the factors which the jury properly considered in determining that the plaintiff was not guilty of contributory negligence.

All of these arguments of the defendant were properly addressed to the jury, which rejected them. The fact that the defendant finds it necessary to rely upon this type of argument in this Court proves the point made in our Petition—that the Court of Appeals reweighed the evidence and substituted its own judgment for that of the jury on the question whether under all the circumstances of this case the plaintiff was guilty of contributory negligence.

The defendant plainly indicates by its own Statement of the Case and its arguments in this Court that the Court of Appeals (1) disregarded the plaintiff's testimony for the reason that allegedly the plaintiff had been impeached; (2) resolved all conflicts in the evidence in favor of the defendant and against the plaintiff; (3) drew all inferences from the evidence most unfavorably to the plaintiff, and (4) viewed all of the evidence most unfavorably to the plaintiff.

Having thus reweighed the evidence and drawn therefrom factual conclusions contrary to those drawn by the jury, the Court of Appeals then applied inapplicable Ohio decisions as pointed out in our Petition.

As to the law of Ohio, the defendant states (p. 15) that we failed "to cite one Ohio decision with facts similar to those presented here." On the contrary, we carefully pointed out (Petition, pp. 22-24) that the general rule in Ohio is that contributory negligence is ordinarily a jury question, and (pp. 24-28) that the cases relied upon by the Court of Appeals were all cases in which the plaintiffs were familiar with the railroad crossings involved—a factor not present here. The defendant now disputes this distinguishing feature of the Ohio cases, but it does not successfully rebut *Zirkoff* v. *Pennsylvania R. Co.*, 90 N. E. 2d 148 (1948) which makes the same distinction.

The defendant cites no authority for its contention that lack of familiarity with the railroad crossing plus failure to warn travelers that what looks like a single track crossing is actually a high-speed double track plus failure to guard the crossing with warnings ordinarily found at such high speed crossings permits the Court to decide the jury question—contributory negligence—as a matter of law.

It is the defendant which fails to cite cases like the present one. The cases cited by the Court of Appeals and by the defendant are clearly distinguishable from the instant case and do not change the normal rule that contributory negligence is a jury question in the courts of Ohio.

This Court has held repeatedly that the Courts of Appeal are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because appeals judges feel that other results are more reasonable. If this were not true, why have a jury?

II.

The Seventh Amendment Was Violated by the Court of Appeals When It Set Aside the Jury Verdict.

In its Brief in Opposition to the Petition, the defendant admits (p. 21) by way of lip-service that the evidence must be viewed in the light most favorable to the plaintiff. It further admits, as hereinabove outlined, that the Court of Appeals viewed the evidence in a light most unfavorable to the plaintiff. The defendant thereby admits that the Court of Appeals acted in place of, and in lieu of, the jury; in violation of the Seventh Amendment to the Constitution of the United States. Your Honors held in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 (1935), as follows (p. 657):

> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court, *and issues of fact are to be determined by the jury* under appropriate instructions by the court." (Italics supplied.)

III.

The Plaintiff Has Shown Special and Important Reason for Granting a Review on a Writ of Certiorari.

In order to support its position that no "special and important" reasons were shown for granting review, the defendant has cited *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938) to the general effect that "conflict among circuits is not of itself a reason," where it is merely corollary to a permissible difference of opinion in the state

courts. This Court, in the same opinion, also stated the following (p. 206):

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decision'."

As pointed out in our Petition, the conflict among circuits in our case is not "merely corollary to a permissible difference of opinion in the state courts," but is an important question of local law decided by the Court of Appeals in conflict with the law of Ohio as decided by the Ohio courts and by the Circuit Court of Appeals for the 6th Circuit.

Again, it is significant that the defendant believes it to be the job of the Court of Appeals to examine the record and "bring a thorough experience in dealing with evidence and determining its sufficiency to go to the jury" (See Brief in Opposition, p. 28). The Court of Appeals does not properly have the task of re-weighing the evidence to determine its sufficiency, but merely to view it in the light most favorable to the plaintiff to determine if any evidence is in the record to support the plaintiff's case. The Court of Appeals in our case viewed the evidence in the light most unfavorable to the plaintiff and determined the question of the credibility of the plaintiff and of the plaintiff's witnesses unfavorably to the plaintiff. The defendant's claim that the court examined the evidence in the light most favorable to the plaintiff is in complete contradiction with its own statement of the case and with the opinion of the court. It is significant that the defendant felt compelled to shore up the opinion of the Court of Appeals by indicating wherein the Court of Appeals was correct in disregarding the plaintiff's testimony, resolving conflicts in evidence in favor of the defendant, and in viewing the evidence most unfavorably to the plaintiff, and most favorably to the defendant.

Further, it certainly is of utmost importance to the injured person that his rights to a jury determination of the facts as guaranteed by the Constitution be protected from an improper reviewing and re-weighing of the case by a Court of Appeals which neither views the witnesses as they testify nor is authorized to determine the facts. In view of the great number of cases involving injured persons, if this Court took the position that it would not review judge-made facts in jury cases, then the final court of all such cases would be the Court of Appeals which would then have the right to take away the right of trial by jury.

In our case, two juries found favorably for the plaintiff on the facts. Two judges found favorably for the plaintiff on a motion for directed verdict. One of the judges in the latter of the two cases, a careful trial judge, found in favor of the plaintiff on defendant's motion for a new trial. In view of these facts, it was error for three judges who neither saw nor heard the witnesses to re-weigh the evidence and draw their own inferences of fact unfavorable to the Plaintiff and thereby reverse the jury verdict.

Wherefore, the Petition for a Writ of Certiorari and review should be granted.

Respectfully submitted,

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